OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ROBERT D. GILMER, Petitioner V.

INTERSTATE/JOHNSON LANE CORPORATION

CASE NO: 90-18

PLACE: Washington, D.C.

DATE: January 14, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT D. GILMER, :

Petitioner :

v. : No. 90-18

INTERSTATE/JOHNSON LANE :

CORPORATION :

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Washington, D.C.

Monday, January 14, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

JOHN T. ALLRED, ESQ., Charlotte, North Carolina; on behalf of the Petitioner.

JAMES B. SPEARS, JR., ESQ., Charlotte, North Carolina; on behalf of the Respondent.

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PROCEEDINGS

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 90-18, Robert D. Gilmer v. Interstate/Johnson Lane Corporation.

Mr. Allred.

ORAL ARGUMENT OF JOHN T. ALLRED

ON BEHALF OF THE PETITIONER

MR. ALLRED: Mr. Chief Justice, and may it please the Court:

Cert. was granted in this case on whether a claim for violation in Age Discrimination in Employment Act is subject to compulsory arbitration. The Fourth Circuit held that arbitration agreement in an application for employment was enforceable and denied Mr. Gilmer access to the United States district court for alleged age act violation. This case focuses on a conflict between two national policies. On the one hand there is the policy of favoring arbitration that has been announced in Mitsubishi and its trilogy, and then on the other hand is the national policy of eradicating employment discrimination in the work place.

QUESTION: Mr. Allred, don't you have a preceding question, which is whether the Federal Arbitration Act even applies --

MR. ALLRED: Yes --

QUESTION: -- in this case? Now, I take it you didn't argue that below? That was not relied upon by you below?

MR. ALLRED: That is correct. That is correct.

QUESTION: Why not?

MR. ALLRED: Well, because in the -- first off, we thought that the Mitsubishi -- I mean, that the Gardner-Denver line of cases were dispositive of the Federal arbitration issue, and in fact -- and we -- we looked at Tenney, the circuit court case, and the cases that followed that, and we did not appreciate the importance of that argument. In looking at the briefs from the AFL-CIO and the AARP and the other amicus we are convinced that it is indeed a compelling argument.

QUESTION: Well, do you think we should address it here in this Court, and are you prepared to have us do so?

MR. ALLRED: We think --

QUESTION: And to argue the issue?

MR. ALLRED: Justice O'Connor, we think that the enforceability of the agreement under the FAA -- if you're going to look at the Federal Arbitration Act, you of necessity have to look at section 1. And so it seems to me that that issue is subsumed within the entire question

that is before this Court. And -- and as, and as you look at that particular issue it seems to me that the plain language of section 1 that says that workers -- that all classes of workers engaged in interstate commerce are excluded from the act is dispositive of the question on the basis of the plain language of the statute.

But furthermore, when you look at the -- at the legislative history of that act, which when -- was gone into in great detail in the brief of the AFL-CIO, it was -- it showed to me beyond all question that it was intended that employment contracts or employment disputes were to be excluded, and that the sole purpose in 1925 of the FAA was that business people who wanted to get together and agree to arbitrate their disputes, that that would be enforceable.

QUESTION: Why do you suppose the Congress referred expressly to seamen and railroad workers if the last phrase dealing with those engaged in interstate commerce would have covered all of those categories?

MR. ALLRED: Well, I think -- I think, Your Honor, that they referred to seamen and railroads because those were basically the two union groups that were lobbying for the exclusion, but the language went on further and said -- it mentioned those two groups but then went further and said all classes of workers engaged in

interstate commerce. And the Tenney case, which limited that to transportation, is really just, was -- at least in retrospect it appears that that court did not have the benefit of the legislative history that this Court has.

QUESTION: Do you think your client was engaged in interstate commerce the way a railroad worker or seaman is engaged in interstate commerce? Part of the --

MR. ALLRED: Well -- well, to the extent that money is engaged in interstate commerce. A seaman or a transportation worker is not carrying goods, so to speak, but money is indeed a part of interstate commerce. And so I don't -- I would not believe that that statute is to be that strictly interpreted.

QUESTION: Well, I think he's effecting interstate commerce. I'm not sure he's engaged in interstate commerce.

MR. ALLRED: Well, I'm not -- I'm not sure that -- if you look at the first -- at the second part of the statute, it didn't -- it didn't really use the word engage, as I recall. Engage was in the second part. And it seems to me that what --

QUESTION: But the first part is the part we're talking about, right? Section 1?

MR. ALLRED: Section 1, yes.

QUESTION: And that does say engaged in.

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MR. ALLRED: That is correct.

QUESTION: Seamen or railroad workers or any other person engaged in interstate commerce.

MR. ALLRED: Well, it seems like to me that if you are working in interstate commerce, you are indeed engaged in it. Perhaps that may be too simplistic, but at least -- at least that's the way it strikes me. If --

QUESTION: This was enacted, of course, in when? When was -- 1925, is that when it was passed?

MR. ALLRED: That is correct, Your Honor.

QUESTION: And the country had, or the Congress had a quite different view of what interstate commerce was in those days. I guess we did, too.

MR. ALLRED: That may well be. And the truth of the matter is, is that the Federal Arbitration Act hasn't really come into any real prominence until just recently. In fact, many of the cases that have dealt with whether -- with whether or not a compulsory arbitration agreement is enforceable has not even addressed the Federal Arbitration Act, just as the Gardner-Denver and the line of cases did.

QUESTION: Gardner-Denver was a collective bargaining contract, wasn't it?

MR. ALLRED: That is correct, Your Honor. But it seems to me that that was only the substance in which the issue arose in that case, because -- because there the

-- what Justice Powell said in there related to Title VII and employment discrimination. The fact that it arose in a collective bargaining context I don't think is any disparity here. It seems to me that that arbitration agreement that was involved in Gardner-Denver came about through equal bargaining power of the negotiation between the union on the one hand and management on the other to reach that.

When Mr. Gilmer and the likes of Mr. Gilmer go to work for the securities industry, there is no equal bargaining power there. They have no choice. They either -- they either agree to that arbitration --

QUESTION: Was the exclusion of employment contracts argued in Gardner-Denver?

MR. ALLRED: I do not believe so, Your Honor.

QUESTION: And -- or in any other of the cases that we have dealt with in the employment context?

MR. ALLRED: No, that -- that is true. But what was addressed --

QUESTION: Everybody has missed it up until this very case.

MR. ALLRED: What was addressed in Gardner-Denver was the fact that when Congress passed the Civil Rights Act of 1964, Title VII, that Congress was acting to correct an enormous national wrong that had gone on for

many years. Age was not included in Title VII, but it was mentioned in a good bit of the legislative history, and for whatever reason it was not picked up until 1967 when the ADEA was adopted. And -- but when the ADEA was adopted, it picked up, basically as this Court has said, Title VII in hoc verba, and this Court has said that when you look at precedents in -- for cases involving age discrimination, you should look at Title VII because you're dealing with the same sort of insidious discrimination.

We think that from the Gardner-Denver line of cases that you have -- that -- there were two things that really prompted the court to operate there, was, one, was the special characteristic of employment relationship that existed, that -- that -- and only -- and Congress felt that only the courts and the procedure that -- or the adoption of the EEOC were the way in which that you could address that. When --

QUESTION: How is your client engaged in interstate commerce?

MR. ALLRED: How would I define engaged --

QUESTION: No. How is your client engaged in interstate commerce?

MR. ALLRED: Oh, well -- well, he was manager of, he was hired as manager of financial services for

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interstate securities.

QUESTION: Well, how was he himself engaged in interstate commerce?

MR. ALLRED: Well, the record -- there's nothing in the record on that, but he was involved in the sale of mutual funds.

QUESTION: Well how would we ever decide in this case whether that's a good answer to your claim or not?

MR. ALLRED: Well, what happened before Judge McMillan was that they moved to dismiss. And we looked at Gardner-Denver, and Gardner-Denver said, and the cases that followed that said, that whenever Title VII or whenever civil rights, or whenever some -- any form of employment -- QUESTION: What would be your submission as to why your client was engaged in interstate commerce?

MR. ALLRED: What would be my submission? Well, that he was managing a group of people that bought and -- that sold mutual funds. And mutual funds, the --

QUESTION: In 1925 do you think that he would have been held to have been involved in interstate commerce?

MR. ALLRED: I don't know the answer to that, Your Honor.

QUESTION: Maybe his actions would have -- might

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effect interstate commerce, but -- maybe Congress these days has the power to regulate what he's doing. But does that mean that in 1925 he was engaged in --

MR. ALLRED: Well, now, if you looked at it from a narrow standpoint that engaged meant that you had to be physically engaged, you had to be driving a bus or a truck or in the transportation industry, I would agree with you. But I don't -- but it seems like to me that if you were in the New York Stock Exchange and you were selling General Motors stock that emanated from Detroit, that that broker, that the people in the investment banking industry were engaged in interstate commerce.

QUESTION: But there was no evidence taken in the trial court on this point?

MR. ALLRED: That is correct.

QUESTION: Because you hadn't raised it?

MR. ALLRED: That is correct, Your Honor. We just -- we read the Gardner-Denver line of cases and saw that this Court has held that whenever employment discrimination is at issue, that arbitration is inappropriate, and that the courts and the EEOC are the -- is the way to go.

QUESTION: Mr. Allred, one thing that sort of suggests that your expansive notion of engaged in interstate concept may be wrong is that, although section

1 uses the term engaged in interstate commerce, section 2,
2 the operative provision here, says it applies to a written
3 provision in any maritime transaction or a contract
4 evidencing a transaction involving commerce. Now, why
5 would Congress say involving commerce in section 2, and
6 say engaged in commerce in section 1, without intending a
7 distinction between the two?
8 MR. ALLRED: Well, Your Honor, there's a good
9 answer to that --
10 QUESTION: I hope so.
11 MR. ALLRED: -- in one of the briefs. The --
12 but I think that you can't, on the one hand, have the
13 situation that says that you are going to allow
14 transactions in commerce to be subjected to compulsory
15 arbitration, and then eliminate those that are engaged in
16 that same activity. It seems to me that the -- that you
17 have to read both of those together. That if -- that if
18 transactions in commerce involve that, then engaged in
19 commerce was -- that you have to read both sections
20 equally.
21 But maybe Your Honor, the transactions were
22 engaged in interstate commerce.
23 See, we submit that from the Gardner-Denver
24 line, that that's dispositive. We think that Federal
25 Arbitration Act is dispositive of section 1. But we also

think that when you look at the Mitsubishi test and its cases, it said that you reached the same result. There they say -- Mitsubishi said that you will enforce the Federal Arbitration agreement unless Congress has manifested a contrary intent. And then, I think it was the McMahon case, said that you can look at the manifest intent of Congress wherein something is inherently contradictory to the act itself. I think that was McMahon.

And here Congress, in Title VII and in the age act, manifested its intent that the Federal court is an integral part of the -- of instrument in the enforcement of the laws designed to eradicate discrimination based on age, race, sex, and religion. And there is an irreconcilable conflict, we see, in the arbitration process and the enforcement of these civil rights laws.

QUESTION: Mr. Allred, could I go back to the question Justice Scalia asked you about reconciling -- involving -- contract evidencing a transaction involving commerce in section 2 and engaged in commerce in section 1. You said one of the amicus briefs provides a good answer to that question. Do you which amicus brief? We've got a lot of them.

MR. ALLRED: I think that that was the AFL-CIO addressed that. I believe it was also addressed in the

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Lawyers' Committee. And -- maybe I'll have an answer for you before I sit down.

At page 13 of the AFL-CIO brief the -- it is said, "We note at the outset that the different syntactical contexts of the two references to 'commerce' mean that use of precisely the same connective in the two circumstances would have created a grammatical problem: a 'transaction' could not be said to be 'engaged in' commerce, nor would a reference to a 'class of workers' as 'involving commerce' make sense. Thus, there is no necessary inference to be drawn from the simple fact that a different connective was used in the two contexts."

QUESTION: You can have a transaction between people engaged in commerce, or a transaction among people engaged in commerce, or a transaction concerning people engaged in commerce. Don't you think?

MR. ALLRED: Indeed. I think that you could probably have a transaction between two people engaged in interstate commerce, and that transaction was not a commerce in interstate commerce.

QUESTION: On the contrary (inaudible) in section 1 if they meant the same thing they could have referred to employees engaged in any business affecting commerce or in any business involving commerce.

MR. ALLRED: I --

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QUESTION: It's a very strange way to say it if they meant the same thing.

MR. ALLRED: But when you look at the legislative history, though, of the Federal Arbitration Act, it is abundantly clear that it was designed only for the business entities, where, when they got together and made their contracts there to buy, sell, or what have you, they agreed to arbitrate their dispute. And we are involved in arbitration a great deal. And they work extraordinarily well --

QUESTION: You mean only corporations, it applied -- it was meant to imply only to corporations or partnerships, is that it?

MR. ALLRED: No, no, no. I can apply -- it applies to individuals. But we're talking about a knowing, a knowing agreement to decide that if you have a dispute over your given -- your given contract, that you decided at the outset that you would arbitrate rather than go to court.

QUESTION: Is it your contention that your client did not knowingly agree to arbitrate?

MR. ALLRED: That is correct.

QUESTION: You -- that was a contention you made in the district court, that he did not, he did not knowingly agree to arbitrate?

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MR. ALLRED: I did not -- I did not say that he -- we were relying on fraud in the district court. I am saying that he had no choice --

QUESTION: Well, but that's quite different than saying he didn't knowingly do it.

MR. ALLRED: Well, he knew he signed a clause that said under the New York Stock Exchange he would agree to arbitrate his disputes, but he had no idea that it would rely to any sort of civil rights that he had, when Congress has passed a law, and under the age act, that says he's entitled to a jury trial, that says that the EEOC has all of this -- all of this process there to investigate, to conciliate. And then under the age act, maybe because age is so paramount, if the EEOC has not acted within 60 days, then he may go ahead and elect to bring suit.

QUESTION: I still don't understand your contention, Mr. Allred. You say that your client of course signed the agreement and that he didn't really know what its full effect would be? Is that your contention?

MR. ALLRED: It's my contention that he had no idea that it would waive his right if he were discriminated against by -- on --

QUESTION: And how did the lower courts resolve -- we didn't grant certiorari on that question, did we?

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MR. ALLRED: You granted certiorari on the question of whether or not compulsory arbitration is -- will -- is available here, can be enforceable here.

QUESTION: Yeah. And so don't, don't we assume for the sake of the question before this Court that your client did knowingly sign the agreement?

MR. ALLRED: I have a hard time -- yeah, you can certainly make that assumption, but our position is that as relates to the securities industry, that this -- the entire security industry has -- if you go to work for them, then you have to sign this agreement.

QUESTION: That was true in the McMahon case, too. Anyone making a deal with the brokers had to sign the same sort of agreement.

MR. ALLRED: But the difference there, Mr. Chief Justice, is that that person dealing with the broker could walk away, and that was a business relationship and not an employment relationship. And -- it is true that Mr. Gilmer could walk away, but if he wanted to go to work in the securities industry he had no choice but to sign that agreement.

QUESTION: Well -- does the Federal Arbitration Act make the sort of distinction you're talking about, do you think? Is that what section 1 means?

MR. ALLRED: Well, I think, the way in which I

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read section 1 is that -- is that any employment dispute, whether it's contract or not, is excluded from the Federal Arbitration Act.

QUESTION: Well, is that all there is to it here, an employment agreement between your client and his employer? Didn't he want to -- what was his job?

MR. ALLRED: His -- he was hired as manager --

QUESTION: But just anybody can't do that -- walk in off the street and do it. Don't they have to register with the Exchange and pass some -- aren't they subject to some rules of the Exchange?

MR. ALLRED: That is correct, Your Honor.

QUESTION: Well, isn't this an agreement, sort of a commercial agreement between someone who wants to engage in that industry and the -- and the private regulatory regime?

MR. ALLRED: Well, it may be a commercial agreement to the extent as it relates to the buying and selling of securities, and that's what the SEC and the SRR was all about.

QUESTION: Was he required, because he registered, to sign this sort of an agreement about arbitration?

MR. ALLRED: I missed -- I did not get your question, Your Honor.

QUESTION: Was he required by the Exchange to sign this sort of agreement?

MR. ALLRED: That is correct, Your Honor.

QUESTION: And so he agreed to that when he wanted into the business.

MR. ALLRED: That is correct, Your Honor. But that relates to the regulation of the buying and selling of securities.

QUESTION: I know, but he agreed when he -- if they were going to -- he agreed, in order to be permitted to do it, to get into this business, he registered with the Exchange, didn't he?

MR. ALLRED: Indeed he did. Indeed he did, Your Honor. But the -- but the Securities and Exchange Commission and the New York Stock Exchange is not that body of law that's designed to look after civil rights for people who are discriminated against in age.

QUESTION: Well, that may be. That may be. But you say that the arbitration -- Federal Arbitration Act was just, just limited to just commercial agreements.

MR. ALLRED: That's what the legislative history --

QUESTION: Isn't this a pretty commercial agreement, if somebody wants to get in the securities business and he has to register and live up to their

rules?

MR. ALLRED: Well, discrimination by age, Your Honor, or discrimination by sex or religion or race, it seems to me is not commercial. And that's --

QUESTION: Well on that basis, on that basis you would say, you would say the Federal Arbitration Act would never apply to these sort of things.

MR. ALLRED: I think that that's the way section 1 reads, literally, and I think that's the way the legislative history of section 1 reads.

In McDonald v. City of West Branch, a case decided in 1984, just 1 year before Mitsubishi, this Court said although arbitration is well suited to resolving contractual disputes, it cannot provide an adequate substitute for judicial proceeding in protecting the Federal statutory and constitutional rights that section 1983 of the civil rights was designed to safeguard. And I would add to that, and the other civil rights.

And in the McMahon case they said that if the -- if the enforcement scheme is inherently in conflict -- if the statutory right is inherently in conflict with the arbitration agreement, then you're not required to do it. And Mitsubishi said if you look at congressional intent, whether it's legislative history or whether it's the whole scheme of enforcement, I want -- this Court well knows the

entire scheme of the EEOC, that of filing a charge, and of its duty to investigate and to conciliate. And even -- and Congress did not do -- make what the EEOC did binding. That even if they found that there was no probable cause, the individual was still entitled to have access to the court.

QUESTION: Are you familiar with that Signal-Stat agreement, or case, in the Second Circuit?

MR. ALLRED: Mitsubishi was the case that involved --

QUESTION: No. Signal-Stat Corporation against Local 475 in 1956, a decision by the Second Circuit.

MR. ALLRED: I'm --

QUESTION: Were you familiar with it?

MR. ALLRED: No. No, I'm not familiar with it, Your Honor.

QUESTION: Well, that case held that employees of an automobile (inaudible) weren't engaged in interstate commerce within the meaning of section 1. And so that was the law of the Second Circuit. Everybody knew it, I suppose.

MR. ALLRED: Well, Tenney held --

QUESTION: So it isn't the first time this issue has ever been raised.

MR. ALLRED: No, but it's -- there was a case

before this Court, I believe in 1988, in which neither side briefed it. That involved a California statute. And the question was whether or not --

QUESTION: Of course, we denied cert. in that case. Maybe unfortunately.

MR. ALLRED: The one that I was referring to, I think it was Potter, was that it held that the Federal Arbitration Act preempted a State law. But the question of whether or not section 1 was involved was not briefed by the parties in that case. The -- the -- one -- arbitration just clearly is not the sort of vehicle by which employment discrimination rights can be vindicated. There -- I can go through a whole litany of --

QUESTION: What about other kinds of rights? Is it all statutory rights that are not covered by the Arbitration Act, or what? What is your position?

MR. ALLRED: Well, as I read -- as I read -- as I read the cases, Your Honor, it's those cases in which the -- when the Congress has passed laws protecting employees with minimum statutory standards, minimum rights, like --

QUESTION: But just employees? Nobody else? What about the Sherman Act, for example, a dispute about whether there has been a violation of the Sherman Act? Two businessmen --

MR. ALLRED: Well, that's covered precisely by the -- by the FAA. If the two businessmen have agreed to arbitrate, then it's therefore enforceable.

QUESTION: But that's a public policy, just as employment discrimination is a public policy. People shouldn't be able to get out of that any easier than they get out of employment discrimination, I guess. Should they?

MR. ALLRED: Well, what the -- they agreed to arbitrate those cases.

QUESTION: Your client agreed here.

MR. ALLRED: Well, I don't think he made -- he agreed to arbitrate any -- he agreed, in my judgment, to arbitrate disputes with respect to New York Stock Exchange rules, with respect to things of that nature, but not his civil rights. And I just don't think that that -- that that was a knowing waiver.

QUESTION: What do you mean by civil rights? I mean, it's not a right of his against the Government?

MR. ALLRED: What I mean by civil rights is to be free from discrimination because of your age, because of your race --

QUESTION: I see.

MR. ALLRED: -- because of your sex.

QUESTION: I see, but not --

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MR. ALLRED: Religion.

QUESTION: Now, what do you rest that principle on? I mean, what I don't understand -- see, I can understand a principle that if it's a public policy you can't arbitrate out of it. But you're not -- you're not willing to say that. You just -- you're just going to say certain public policies, but what's the basis for distinguishing this kind of public policy from other kinds of public policies?

MR. ALLRED: Well, because Congress passed the law doing it, and then passed this intricate scheme for the enforcement of it. And as Congress recognized in the Norris-LaGuardia Act, and I think this is important here, and this is in the act itself, it said the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby obtain acceptable terms and conditions of employment.

If this Court affirms the Fourth Circuit, then the securities industry has foreclosed the courthouse door to any person who contends that they have been discriminated against by virtue of any civil rights act, Title VII, age. And other industries will indeed then have as a condition of employment that you will agree to arbitrate. And I think that it will basically be the

death knell of civil rights as started with the Civil Rights Act of 1964. It's just inconceivable to me that this Court will do that, because arbitration is suitable for handling business disputes, and handling business disputes between people knowingly made the decision to opt at the outset to --

QUESTION: Well, isn't the allegation here that this individual knowingly agreed to arbitration? I mean, that's how we take the case, as the Chief Justice inquired about earlier. Don't we have -- don't we have to accept the case on that premise and go from there?

MR. ALLRED: I don't -- I don't think so, Your Honor. I think that it was -- it was just as the Norris LaGuardia Act. It was not knowing as relates to being discriminated against because of age. It was -- in the context in which you referred to it, it was knowing as relates to being employed in the securities industry, and agreeing to arbitrate any disputes that he might have with his employer over the employment, but not with respect to Title VII or with respect to the age act.

QUESTION: Thank you, Mr. Allred.

Mr. Spears, we'll hear from you.

ORAL ARGUMENT OF JAMES B. SPEARS, JR.

ON BEHALF OF THE RESPONDENT

MR. SPEARS: Mr. Chief Justice, and may it

please the Court:

There's no dispute in this case that the text and the legislative history of the act, the age act, are silent as to any congressional intent to prohibit arbitration. The FAA in that circumstance mandates arbitration unless there exists an inherent and irreconcilable conflict between arbitration and the purposes of that age act. That's the issue for this Court to decide.

Such a conflict cannot be shown here. Indeed, enforcement of the arbitration agreement here complements the ADEA's purposes. A comparison of the act's purposes with arbitration eliminates a concern about any conflict existing. The act's purposes are contained in section 2(b) of the act. They are threefold. Number one, to promote the employment of older workers; number two, prohibit arbitrary age discrimination; and number three, to help employers and employees find ways of meeting the problems impacted with regard to age. The choice of arbitration clearly does not conflict with any of these purposes.

To the contrary, the enforcement of the provisions -- the enforcement provisions chosen by Congress shows that it preferred that multiple methods be available to employers and employees in meeting problems

under that act. As one alternative, Congress provided for court enforcement. Noteworthy they provided for court enforcement in any court or competent jurisdiction. It is not restricted to the Federal courts. It is very similar to the '33 Securities Act which this Court addressed in the Rodriguez case. This Court commented that the wider choice of court provision in that statute indicated a congressional intent of allowing wider choice of alternatives for resolving claims under that act.

Before any litigation, what does Congress provide? Congress expressly favors in the statute -- resolution of disputes through voluntary means. The conciliation, conference, and persuasion mandated in the statute by Congress are certainly more akin to arbitration than they are to litigation. In fact, Congress provides for resolution of disputes in multiple administrative and judicial forum. It's not just limited to the courts. Congress never said if you've got an age claim you have to go immediately to the court.

An individual, of course, is required to file an EEOC charge, but beyond that requirement, he is allowed to leave it with the EEOC for them to attempt conciliation. The individual can file a claim with the State or local agencies. And as noted previously, he can also file a State or Federal lawsuit.

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QUESTION: Mr. Spears, I gather you're arguing that the contract would be enforceable even if there were no Federal Arbitration Act?

MR. SPEARS: The Federal Arbitration Act mandates enforcement of it unless there's a contrary indication in the statute, Justice Stevens.

QUESTION: It mandates enforcement of a contract evidencing a transaction involving commerce.

MR. SPEARS: And this clearly is.

QUESTION: What is -- it evident -- the contract evidence the hiring agreement between the employer and the employee. Now, how does that -- that's the transaction the contract evidences, isn't it?

MR. SPEARS: It's not limited to that, Your Honor. As Justice Stevens pointed out, there's a requirement here. This is a -- one -- I'm sorry, Justice White, excuse me.

QUESTION: No, that's Justice Stevens.

(Laughter.)

MR. SPEARS: I apologize, Your Honor, but I was trying to refer to your comments earlier today --

That the registration agreement here is at the minimum and probably more than a three-party agreement.

QUESTION: But are -- are you suing for enforcement of that?

MR. SPEARS: Yes, Your Honor.

QUESTION: I thought you were suing for enforcement of the provision in the employment contract.

MR. SPEARS: It's enforceable either way. It doesn't matter --

QUESTION: If he had not signed an employment contract would you still have the same claim?

MR. SPEARS: Yes, Your Honor, because --

QUESTION: So you're not relying on the arbitration clause in the employment contract?

MR. SPEARS: No. The arbitration clause is part of the rules. The arbitration clause is imposed by the -- by the -- by the New York Stock Exchange.

QUESTION: I understand that. So that what you're saying is that even had he not voluntarily signed this contract, the result would be the same?

MR. SPEARS: I'm not sure I understand that question, Your Honor.

QUESTION: Well, I thought you were relying on the arbitration clause in the employment agreement. And I think now you're telling me you're not.

MR. SPEARS: The arbitration clause is in his registration agreement. There is no separate written employment agreement. The arbitration clause -- agreement, is in the registration agreement with the New

York Stock Exchange, which, by the way, the company is required to get him to agree to. To allow him to engage in a transaction involving the buying and selling of securities, Congress mandates -- I'm sorry, the securities, New York Stock Exchange requires that anyone that is allowed that privilege has to become registered with them, and has -- and by becoming registering agrees to abide by the constitution and rules as -- which includes the requirement of arbitrating any dispute.

Rule 345, with regard to the concern about any voluntariness here, rule 345 says, it is quoted at page 1 of our appendix, that any controversy between a representative and any member or member organization arising out of the employment or termination of employment, as such registered representative shall be settled by arbitration at the instance of either party. Either party could enforce this. It's not limited to the company. He himself has a right to enforce this. But aside from the employment relationship, this is a business contract that relates between at least the three party and even outside parties.

QUESTION: So your answer is that the transaction involving commerce was his agreement to abide by the rules of the Exchange? His application for -- his registration is the transaction --

MR. SPEARS: Is the contract evidencing the transaction involving commerce. Yes.

QUESTION: And the involving commerce -- I see. What did the Exchange agree to do in exchange for his promise?

MR. SPEARS: Agreed to allow him to buy and sell securities, or have any involvement with that.

QUESTION: Does it sign the --

MR. SPEARS: And they also allowed him to take advantage of the arbitration benefits here also.

QUESTION: Does he sign the agreement -- does the Exchange sign the agreement, too, and he keeps a copy and they keep a copy? Is that what happens?

MR. SPEARS: It comes down from the Exchange as the rules. They are the superior or proven authority here. It is signed, coincidentally, Justice Scalia, by a representative from the company. It is called a U-4 form. It appears at page 13 of our appendix. It is signed by --

QUESTION: The thing that's running through my mind, while you're looking for it, if the transaction involving commerce is his entitlement to engage in buying and selling over the Exchange, why isn't he then a person engaged in commerce?

MR. SPEARS: He is, by virtue of this agreement.

QUESTION: He is a person engaged in commerce?

MR. SPEARS: He is not only -- he -- his contract, his agreement to be bound by arbitration and all the other rules of the Exchange is the contract involved in the transaction involving commerce.

QUESTION: And it involves commerce because he then becomes a person engaged in commerce, as I understand it.

MR. SPEARS: If he relates to a transaction involving commerce.

QUESTION: Which then brings him squarely within the language of section 1.

MR. SPEARS: Well, section 2.

QUESTION: And section 1.

MR. SPEARS: Well, with regard to that, I think the difference in the language that was noted intends a broad application of section 2 and a narrow, restrictive application of section 1 exclusion. I think that difference there means something --

QUESTION: Yeah, but not the way you just described it and explained it to me.

MR. SPEARS: Well, I --

QUESTION: You want to change your explanation, I guess.

MR. SPEARS: Well, I guess I'll have to, Your Honor, because I -- I'm more convinced that the difference

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in the language gives an expansive reading, and indeed the courts have applied an expansive, have given the FAA an expansive reach, not a constricted reach. This Court in Perry v. Thomas enforced the very form, the U-4 application form involved in this case.

By the way, I found now that --

QUESTION: It's not in your appendix. It must be somewhere else. Is it in the joint appendix?

MR. SPEARS: I'm sorry, Your Honor. I apologize. It is the joint appendix at page 14. It's signed by Harry M. Boyd, the Executive Vice President of the company, which agrees not to employ him unless he, unless he becomes registered as required by the law. So the company, above signing this, but it is signed by the company, is also bound by the rules and the restrictions included in the arbitration agreement under the New York Stock Exchange.

Now, returning to the issue that I believe is before the Court, the -- section 7 of the age act provides than an aggrieved citizen may bring a civil action in a court of competent jurisdiction. It's not mandatory. This is permissible language. Indeed, as Judge --

QUESTION: Mr. Spears, I mean, I don't think there has ever been a statute passed that says someone has to sue. They're all couched in that language.

MR. SPEARS: Exactly. Well -- Your Honor, and in -- in the Mitsubishi case this Court noted the fact that the statute, I think it was the Sherman Act, did not require an individual to bring a lawsuit as indicative of the choices that were available. I think it's at 473 U.S. at page 637. It was noted in Mitsubishi that the fact that -- for example, there are some administrative procedures required by Congress where the individual has no control over that, under the National Labor Relations Act, for example. That is solely up to the NLRB. And section 10(a) of the NLRA says that there are no agreement between any parties can divest or affect the jurisdiction of the NLRB. That is a special situation, and therefore the FAA could not enforce any agreement to arbitrate under that act. But the contrast is important there.

The difference between the Sherman Act, the Rico statutes, the two securities acts, that allows any individual -- that allows an aggrieved individual to go not only into Federal court but to any court --

QUESTION: Your point then is that the act puts it in the hands of the aggrieved individual, rather than of some agency or board?

MR. SPEARS: Yes, Your Honor, and gives them a choice to go to court or not go to court. I guess that more precisely makes my point. To choose other fora that

are available. This includes, of course, private settlements. They are allowed under the age act. Another example is, of course, arbitration. They are encouraged by the FAA. And arbitration is not mentioned in the statute. Under McMahon it is not necessary to mention it in the statute.

Significantly, Congress has not eliminated arbitration as an alternative under the age act. The silence of the age act we think is significant. Indeed, the need for more alternatives to litigation is ever increasing in this country. Even as far back as 1967 when Congress passed the law, they noted in section 2 of the act that the numbers of auto workers are "great and growing." More recently, according to a U.S. Census Bureau report quoted in one of our amicus briefs, by the year 2000, 20 percent of our population will be 55 or older. By the year 2030, almost 33 percent will be 55 or older.

Now, the Equal Employment Opportunity Commission is having difficulties -- in fact they're having difficulties managing the -- their work load now of EEOC charges involving age claims. Imagine how much more difficult it's going to be.

Noted in one of our amicus briefs, in the Harvard Law Review report -- article, 104 of Harvard Law

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Review, a startling fact where the former chairman of the Commission, Clarence Thomas, in 1988, where the Commission reported that it may have mishandled as many as over 7,500 complaints of age discrimination over the previous 5 years by failing to act on them before the 2-year statute of limitation ran.

Congress' silence says something. It says there ought to be these alternatives available for individuals to resolve these claims. They shouldn't be restricted to only going to court. Arbitration can clearly help mitigate these problems. Older workers don't have as much time to wait for a remedy. Extended litigation deprives them of an earlier remedy. Alternatively, quicker resolution through arbitration complements Congress' goals. It doesn't conflict with them.

If reinstatement is found to be an appropriate remedy in arbitration, it can be quicker, cheaper, and certainly less adversarial than litigation. Isn't that better for everyone? It's much easier for an employer to reinstate someone within a matter of months than it is when the time, litigation cost, and yes, even the emotional involvement of litigation, have made that prohibitive.

QUESTION: Well, Mr. Spears, wouldn't the arbitration award be subject to some minimum form of

judicial review after it were made?

MR. SPEARS: Yes. Yes, Mr. Chief Justice, but it would be reviewed much quicker, because it would be resolved more quickly, as a general proposition. And I'm focusing now on the time, whatever the review might be allowed. Whether it's affirmed or overturned or sent back for a reevaluation, all the parties are better off to have that resolved sooner than it is now in litigation.

QUESTION: Yes, but I'm wondering whether your analysis is accurate. You point to the delay -- are you just talking about administrative delays before a case goes to the court where you are simply suing?

MR. SPEARS: No, Your Honor. I was really comparing that with the litigation itself.

QUESTION: Well, but you're going to have -- litigation itself would certainly describe what you have when an arbitration award is reviewed, wouldn't you? I mean, you have an action, the district court to review the award. If the people are dissatisfied they could appeal to the court of appeals.

MR. SPEARS: But it's not a de novo review. It would be a far --

QUESTION: A more limited inquiry?

MR. SPEARS: A more limited review, as authorized and only as authorized by section, I think it's

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10 and 11 of the Federal Arbitration Act. And the deterrence of the act, another goal of the act, another goal of encouraging people to file charges, would also be enhanced by resolution through arbitration. Where a co-worker sees that another co-worker had his age claim rights vindicated through arbitration quickly, or certainly more quickly than might be available in litigation, that co-worker, if he or she is indeed a victim of age discrimination, is going to be more likely to pursue her rights under the statute.

This is particularly important where you're talking about victims that don't have the economic wherewithal to take on expensive and time consuming litigation.

QUESTION: What if the co-worker is denied relief in arbitration?

MR. SPEARS: I think -- I would assume the individual would understand that was based on the merits and the resolution of that particular claim. Knowing that a co-worker -- anyone can get to arbitration quicker, Justice Blackmun, is my point there, that whatever the ultimate resolution, as long as the rights can be vindicated, as this Court has said, then deterrence is also being fulfilled.

QUESTION: Mr. Spears, do the arbitrators have

the power to award the kind of systemic relief that might be available in court under the ADEA?

MR. SPEARS: Justice O'Connor, I'm not aware of anything in these rules that would prohibit them from doing that if the facts in a particular arbitration were to justify that. There has been a recent amendment to one of the rules -- I'm sorry I can't quote you the particular rule -- which does allow for multiple parties to participate in an arbitration --

QUESTION: How about a class action?

MR. SPEARS: Your Honor, I think it's very similar to a class action. In an age case, of course class members have to opt in. They have to exercise that option to opt in. That is very analogous to the, to this New York Exchange rule that allows multiple parties to participate. And Your Honor, with regard to -- excuse me, Mr. -- Justice O'Connor, I think there -- I know there are no restrictions in these rules on the power to remedy that the arbitrator has. My view is that the arbitrator has all of the same power that to remedy that is available under the statute.

Arbitration, of course, finally, also helps reduce the overburden work load of the Commission, State, and local agencies, and hopefully the Federal courts. The Court has found that other statutes reflecting equally

important public interest to be entirely appropriate for arbitration. The reasons are clear. The public interest in those statutes were not diminished by arbitration. The liberal policy favored in arbitration under the age act -- I'm sorry, under the FAA, must be applied absent affirmative congressional intent to prohibit.

I would like to turn next to the argument, as I understand it, of the petitioner that somehow the age act is different. The plaintiff, in my view, attempts to create a conflict between the purposes of the age act and the purposes of the line of cases of -- the FAA cases of this Court. Indeed, he seems to argue that unless Gardner-Denver is allowed to control the circumstances here, then Gardner-Denver must be reversed. Well, those are two poles apart, and there's a lot of ground in between.

Our position is very clear. There is no need to even consider reversing Gardner-Denver or any progeny of that decision. The factual differences, the legal issue differences, and the analysis differences under the different lines of cases are so stark that there's no conflict at all, and therefore both purposes, both statutes' purposes can be satisfied.

QUESTION: What would you say is the principal distinguishing feature between Gardner-Denver and this

case?

MR. SPEARS: Your Honor, I think at bottom it's the collective bargaining context of Gardner-Denver. That dominated the Court's consideration, and I would submit the ultimate resolution of that claim. The Court focus in that case upon -- which by the way was an already-completed arbitration. It was not an issue of enforcing an arbitration agreement. The arbitration had already been done under a union's collective bargaining arbitration mechanism. And the Court said in Gardner-Denver that only the contractual claim had been resolved. Now, here comes the company saying well, we won the discrimination issue in arbitration, that forecloses the statutory claim. That's what was rejected, because what you had there was a conflict between two public policies, one encouraging collective bargaining, and the salutary benefits of collective bargaining including resolution of claims through arbitration.

But that sort of arbitration has nothing in common with the arbitration under the New York Exchange rules. Mr. Gilmer was never a member of a union. He remains in full control of selecting the arbitrator, deciding what evidence to submit. There is no one between him and the resolution of his claim.

QUESTION: Did the arbitration in Gardner-Denver

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purport to determine the statutory issue? I thought it was purely an arbitration about the contract dispute and not about any statutory violation?

MR. SPEARS: That's what I meant to say, Justice Scalia, is that --

QUESTION: Is that what you've been saying? I didn't --

MR. SPEARS: No, the Supreme Court said that the arbitration only resolved the contractual claim under the collective bargaining contract. And the company apparently was trying to take that contract resolution and saying well, then, that controls, through preclusion, that controls the results under the statute. And that's at bottom what made the difference in that case, because you -- the Court was clearly concerned about the fox in the hen house problem. Because clearly -- and it said so in that decision, that letting the two entities that are the -- I'm not talking about the specific ones in that case, but the employer and the union, both of which have been accused, not in that case but in other cases, of discrimination. And the act was passed to address that sort of stuff. So they clearly -- the Court clearly did not feel comfortable with the union being in charge of even the ultimate decision of whether it went to arbitration.

QUESTION: What about the McDonald case? That was a statutory right issue.

MR. SPEARS: Yes, Your Honor, under 1983, as I recall the facts of that case. And it's no different than Gardner-Denver. It also was a collective bargaining --

QUESTION: I thought you said the difference in Gardner-Denver was they didn't resolve the statutory issue? And then I asked you about a statutory case and you say they're exactly the same.

MR. SPEARS: Well, there was a collective bargaining arbitration in McDonald also, an already-completed arbitration. And the issue there was, again, preclusion, whether or not the resolution of the contract issue controlled the statutory issue under 1983. So the case as, I see them as just being identical to one another.

QUESTION: I thought -- wasn't the statutory issue submitted to the arbitrator in McDonald? I thought it was.

MR. SPEARS: Your Honor, I don't recall. I'm sorry.

QUESTION: I thought it was. But at least it's similar to Alexander in that it involved a collective bargaining agreement, so that the person who had agreed to the arbitration was not the individual who was -- whose

statutory right had allegedly been taken away.

MR. SPEARS: That's right.

QUESTION: But rather somebody else purporting to act on that individual's behalf.

MR. SPEARS: And that probably controlled whether or not the issue even went to arbitration. That is, that is the fundamental difference, and that's of course not present here. There is no conflict like that here. There is not even the potential for the conflict here.

The -- in closing, I want to point out certain unique facts about this case that I think fully support the compliance with the FAA's mandate for arbitration here. The facts are peculiarly appropriate for arbitration. Mr. Gilmer is an experienced executive. He's not a worker moving goods in commerce. For 20 years he has been registered with this very stock exchange that he registered with with this respondent. He has worked in the industry for the 28 years. The registration agreement is a customary requirement of stock brokers buying and selling securities in this highly regulated industry. Indeed, the agreement is no different than the very type of agreement this Court has found enforceable against customers, far less sophisticated, in McMahon and the Rodriguez case. This arbitration agreement is an integral

part of the Exchange's self-regulatory --

QUESTION: Mr. Spears, can I ask you this? Would your position not be precisely the same if a non-union employer just required all his employees to agree to arbitrate any dispute? Statutory, civil rights, or anything else?

MR. SPEARS: If they are under -- if they comply -- if they come under the FAA, yes.

QUESTION: Right, if they're engaged in commerce, yeah. So you don't really need -- I mean, I understand it strengthens your case, but I think your basic position is that, absent a collective bargaining agreement, an employer-employee agreement to arbitrate all disputes, including statutory disputes, is enforceable? I think that's really what it comes down to, isn't it? And I'm not saying you're wrong, but --

MR. SPEARS: Yes.

QUESTION: -- I think that's what you're arguing.

MR. SPEARS: Yes. It's enforceable particularly in light of the FAA --

QUESTION: Right.

MR. SPEARS: -- because that mandates enforcement of that.

Your Honor, one final point I would like to

point out. In their argument that the purpose of the age act is so paramount or so important that it ought to be treated differently, and I assume they feel the same way about Title VII, in our view that was rejected in Mitsubishi. That argument was made in Mitsubishi that the importance of the act there was so paramount that, that the Court should not allow enforcement under the FAA. In that decision Justice Blackmun pointed out that a concern for statutorily protected classes provides no reason to color the lens through which the arbitration clause is read, provides no reason. You don't look at is the class age victims, or is the class black employees, or is the class securities customers. That has been rejected in Mitsubishi.

Indeed, in October 1989 this Court rejected, in my view, a very analogous case, the Second Circuit case in Bird v. Shearson Lehman. It vacated and remanded that in light of the Rodriguez decision. While I certainly don't know the precise reasons, it seems to me that the strong language in McMahon, Rodriguez, based on Mitsubishi, has eliminated this sort of public policy, this sort of value judgment that somehow this statute is different, or this statute is so important that arbitration just should not be allowed to touch it. I think it's implicit in the vacation and remand of that that that argument is long

gone. That, of course, is what this Court said was the primary underpinning of the Wilko v. Swan.

In fact, in Mitsubishi the Court also rejected the Second Circuit's standard known as the American Safety Equipment Standard, which was, again, a case that focused on -- the Sherman Act in that case was viewed to be so different and so important that it could not be arbitrated. In -- I think it was the McMahon case or Mitsubishi, this Court took those and point by point rejected the underpinnings.

QUESTION: Mr. Sherman, was that -- was the Bird case an employment case?

MR. SPEARS: It was an ERISA case, Your Honor. It involved employment benefits under ERISA. And it -- the Second Circuit Bird decision, reading that is exactly -- indeed it relies upon Gardner-Denver, Barrentine, and McDonald, the same way the plaintiff does here.

QUESTION: Has the Second Circuit regularly had cases dealing with employees of securities companies?

MR. SPEARS: Your Honor, maybe more often because of New York.

QUESTION: Have they ever adjudicated one?

MR. SPEARS: Not out of New York, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Spears. The case is submitted.

(Whereupon, at 1:59 p.m., the case in the above-entitled matter was submitted.)

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